STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2004
v	No. 244419 Monroe Circuit Court
GARY ROBERT LIVINGSTON, Defendant-Appellant.	LC No. 02-031854-FH

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of breaking and entering a coin-operated device, MCL 752.811. He was sentenced, as a fourth habitual offender, MCL 769.12, to twenty-two months to fifteen years in prison. We affirm.

Defendant's first issue on appeal is that he was denied the effective assistance of trial counsel where trial counsel failed to object to the alleged lack of foundation for admission of DNA evidence. We disagree. Claims of ineffective assistance of counsel are reviewed de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001).

A defendant who claims he has been denied the effective assistance of counsel must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that counsel's substandard performance substantially prejudiced defendant. *People v Sabin (On Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "A defendant must overcome a strong presumption that the assistance of [their] counsel was sound trial strategy." *Id.*

Defendant argues that the DNA expert did not personally calibrate and maintain the equipment she used, nor did she produce any logs or other evidence showing when it had been serviced. Defendant analogizes to this Court's opinion in *People v Ferency*, 133 Mich App 526, 542-545; 351 NW2d 225 (1984), in which this Court set out the guidelines required to be met to allow evidence of a traffic radar speedmeter reading to be admitted in speeding cases. Defendant specifically urges this Court to consider the requirement in *Ferency* that requires the prosecution to show that the speedmeter has been properly calibrated and maintained and impose a similar requirement for DNA testing equipment.

Defendant's reliance on *Ferency* is misguided. *Ferency* mandates only that the radar speedmeter unit be serviced by either the manufacturer or some other appropriate professional, not the user. *Ferency*, *supra* at 243-245. Moreover, this Court recently issued an opinion dramatically diminishing the significance of the maintenance/calibration prong of the *Ferency* test. In *City of Adrian v Strawcutter*, 259 Mich App 142, 144; 673 NW2d 469 (2003), this Court held that this particular requirement "does not mandate any specific actions" because service is only mandated as recommended. *Id.* "This does not preclude the possibility that *no* service may be recommended." *Id.*; emphasis in original.

Additionally, there is substantial case law establishing the reliability and admissibility of DNA testing evidence, and the testimony presented regarding statistical analysis clearly contradicts defendant's argument. As defendant concedes, "[o]ur courts firmly accept polymerase chain reaction (PCR) testing of evidence to obtain DNA profiles." *People v Coy (After Remand)*, 258 Mich App 1, 11; 669 NW2d 831 (2003). We conclude that defense counsel did not object at trial because no reasonable objection could be made, and that defendant has not made the strong showing mandated by *Sabin (On Remand)*, *supra*, that defense counsel's decision was not sound trial strategy. Defendant was not denied the effective assistance of trial counsel.

Defendant's next issue on appeal is that the trial court erred in admitting fingerprint evidence. Again, we disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *People v Bulmer (After Remand)*, 256 Mich App 33, 34; 662 NW2d 117 (2003).

Defendant cites *People v Willis*, 60 Mich App 154, 158-159; 230 NW2d 353 (1975), and *People v Ware*, 12 Mich App 512, 515; 163 NW2d 250 (1968), in support of his argument that fingerprint evidence is inadmissible except where the prosecution can prove that defendant could only have left the print at the scene of the crime at the time the crime took place. However, *Willis* and *Ware* apply only where the sole evidence used to convict a defendant is fingerprint evidence. *Willis*, *supra* at 159; *Ware*, *supra* at 515. Here, there was additional evidence presented, including DNA evidence. That notwithstanding, the *Willis* Court also held that the question of whether the prints could only have been impressed by a defendant at the time of the crime is a question for the jury. *Id.* We agree with *Willis* that defendant's argument goes properly to the weight of the evidence, but not to its admissibility. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the fingerprint evidence.

Defendant's next issue on appeal is that the trial court erred in admitting evidence of other bad acts under MRE 404(b). For evidence to be properly admitted under MRE 404(b), there are three requirements: that (1) the evidence is offered for a proper purpose under MRE 404(b), (2) it is relevant under MRE 402, and (3) its probative value is not substantially outweighed by any unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). MRE 404(b) states, in relevant part, that while evidence of other crimes may not be used to prove bad character or a propensity to commit a crime, it may be admissible for other purposes, such as proof of motive, intent, common scheme, plan, or system in doing an act, or absence of mistake or accident. MRE 404(b)(1).

The "bad acts" evidence regarded two other incidents at the victim's car wash. On September 6, 2001, one of the coin boxes was broken into in an apparent larceny attempt. However, the box contained no coins because there was a tube going from the coin box to a collector box in an adjoining room. A two-foot square hole was cut into the bay's wall in an apparent attempt to follow the money. Defendant's blood was found on the jagged metal pieces cut out of the wall and also on the water heater behind the hole. On October 22, 2001, while the police were at the car wash, a car pulled into the non-adjoining bay and "pulled right back out again." The police investigated and found that the coin box in that bay had been pried open and the coins removed. We find that the trial court admitted this evidence for a proper purpose; namely, to show defendant's common scheme or plan, and also to show intent. Such a purpose is properly shown if the charged offense is sufficiently similar to the other acts "to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). The similarity in these incidents are indicative of defendant's plan to systematically return to the victim's car wash in an effort to steal the money deposited in the bay's coin boxes.

We also find that these other acts were relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Here, the evidence made it more probable that defendant's repeated visits to the car wash were not for a legal purpose.

The final test is whether the evidence is unfairly prejudicial, which occurs "when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). As this Court noted, all relevant evidence "is somewhat prejudicial to a defendant—it must be so to be relevant." *People v Maygar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). The trial court considered the prejudicial effects, and stated that it would issue a limiting instruction to the jury prior to deliberations. The court also offered to require the prosecution to recall witnesses to allow defendant to further cross-examine them. Furthermore, the trial court's instructions to the jury specifically limited the jury's consideration of the evidence to purposes permitted by MRE 404(b), and specifically prohibited the jury from inferring bad character on the part of defendant. The fact that the trial court issues a limiting instruction "that cautions the jury not to infer that a defendant had a bad character and acted in accordance with that character" contributes to a finding that evidence was not unfairly prejudicial. *Maygar*, *supra* at 416. Juries are presumed to follow the court's instructions, and "instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Based upon the foregoing, we conclude that there was no unfair prejudicial effect that *substantially* outweighed the probative value of the evidence, and, therefore, the trial court did not abuse its discretion in admitting it.

Defendant's final issue on appeal is that the sentence imposed by the trial court constituted cruel and unusual punishment. In *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003), this Court rejected this exact argument where the defendant's minimum sentence fell within the statutory guidelines because, in such cases, appellate review of sentencing is statutorily limited to claims of scoring errors or reliance on inaccurate information. Here, defendant's minimum sentence of twenty-two months falls within the guidelines range of zero to twenty-two months. Defendant does not allege this range to be incorrectly calculated,

nor does he assert that the court relied on inaccurate information. Under these circumstances, we must affirm defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003).

Affirmed.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski